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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted]

FRANK A. DiPIERRO,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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TABLE OF CONTENTS.

Citations and Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitution and Statutes Involved	2
Statement of Facts	3
Reasons for Granting the Petition	5
Conclusion	6
Appendices:	
A. Journal Entry of the Court of Appeals of Cuyahoga County, Ohio	7
B. Order of the Supreme Court of Ohio Overruling Motion for Leave to Appeal from the Court of Appeals for Cuyahoga County	7
C. Order of the Supreme Court of Ohio Denying Rehearing	7

TABLE OF AUTHORITIES.

Cases.

Deutch vs. State, 46 Ohio Appeals 223	6
State vs. Cloud, 14 Ohio Opinions (2nd) 132	5

Statutes.

Constitution of the United States, 5th and 14th Amendments	2, 5
Ohio Revised Code, Sec. 2901.16	2
28 U. S. C. Sec. 1257(3)	2

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To the Supreme Court of Ohio.

Petitioner above named prays that a writ of certiorari issue to review the judgments of the Court of Appeals of Cuyahoga County, Ohio, entered on July 18, 1962 and the judgment of the Supreme Court of Ohio overruling petitioner's motion for leave to appeal entered on January 23, 1963, and denying application for rehearing, entered on March 6, 1963.

CITATIONS AND OPINIONS BELOW.

None of the State courts hearing petitioner's case wrote any opinion in connection with the disposition of any phase of the case. The judgment of the Court of Appeals of Cuyahoga County, Ohio, entered on July 18, 1962 is unreported and is printed in Appendix "A" hereto (*infra* p. 7).

The Order of the Supreme Court of Ohio overruling petitioner's motion for leave to appeal, entered on January 23, 1963, is unreported and is printed in Appendix "B" hereto (*infra*, p. 7).

The Order of the Supreme Court of Ohio, denying petitioner's application for a rehearing, entered on March 6, 1963, is unreported, and is printed in Appendix "C" hereto. (*infra*, p. 7).

JURISDICTION.

The Judgment of the Supreme Court of Ohio was entered on January 23, 1963. Application for rehearing was timely filed, and was denied on March 6, 1963. The jurisdiction of this Court is invoked under Title 28, U. S. C. Sec. 1257(3).

QUESTION PRESENTED.

Whether petitioner was deprived of his liberty without due process of law in violation of the 5th and 14th Amendments to the Constitution of the United States, when the conviction was obtained by the inflammatory final argument of Counsel for the State of Ohio, which was calculated to and did arouse the passion and prejudice of the jury against the petitioner.

CONSTITUTION AND STATUTES INVOLVED.

A. United States Constitution, Amendment V.

"* * *; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law * * *"

Amendment XIV, Section 1.

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. Ohio Statute.

Sec. 2901.16 R. C. "No person shall prescribe or administer a medicine, drug, or substance or use an

instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose. Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years.

STATEMENT OF FACTS:

Charlotte Marie Erney, the prosecuting witness, was an unmarried woman who claimed that on July 14, 1960, Frank A. DiPierro, petitioner herein, aborted her in her apartment. She stated that she met the petitioner at a Euclid Avenue Motel, in Cleveland, Ohio, where she also was in the company of a Barbara Wagner and Jack F. Carson, both of whom testified as witnesses for the prosecution, but knew nothing of the alleged abortion.

Miss Erney also testified that she had an illegitimate child and had been intimate with at least six other men. It appeared also, that Miss Erney was employed at the time by a travel agency and had taken money from her employer without his permission. She was a frequenter of several liquor bars and permitted men whom she met in these places to buy her drinks.

On July 25, 1960, she visited a Dr. Sargis because she was bleeding from the vagina, but no one at that time was told by her or Dr. Sargis that there had been an abortion.

In the latter part of August, 1960, she was visiting a liquor bar and threatened to commit suicide. The police were called. At the suggestion of the police, she went back to Dr. Sargis, who re-examined her and for the first time, gave a report thereof to the police.

The Petitioner testified that he is in the Cement contracting business. He testified that he met Miss Erney at a bar in a motel on Euclid Avenue, and denied that he got

any money from her or that he did anything to abort her. None of the State's witnesses, except Dr. Sargis and Miss Erney, gave any testimony regarding an abortion having been committed on Miss Erney. The defendant-petitioner was found guilty of abortion and sentenced to the Ohio penitentiary.

The error complained of and upon which petitioner bases this petition for a writ of certiorari took place in the course of the argument of the prosecutor, at the close of the evidence. The prosecutor made the following statement to the jury:

> "This case involves the citizens of this community, the millions of men and women that you represent. It involves the Defendant, the State of Ohio. It involves one of the most serious crimes that a person can commit. It involves the abortion racket, which at the present time is the third largest racket in the United States."

Counsel for the Defendant objected to this line of argument and the court sustained the objection. A motion was made to withdraw a juror and declare a mistrial but the trial court overruled same. A motion for new trial was also filed urging the same error as ground for a new trial. An appeal was taken to the Court of Appeals for the Eighth Judicial District of Ohio (Cuyahoga County), and the misconduct of Counsel was assigned as error, as depriving the petitioner of a fair trial under the Constitution of the United States and the Constitution of the State of Ohio. The same error was urged by an assignment of error filed in the Supreme Court of Ohio. All the Courts hearing this cause refused to recognize the error complained of.

REASONS FOR GRANTING THE PETITION:

Certiorari should be granted here for the reasons that (a) The courts below have departed or so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; (b) elemental considerations of justice and constitutional law require reconsideration of the conviction of the petitioner; (c) the case presents important questions affecting the rights of defendants in criminal cases, the determination of which is of great national concern, as same affect the civil rights of all of our citizens.

The prosecutor's argument to the jury went outside of the record of the testimony presented against the defendant, and implied that he was part of the abortion racket and that the jury must convict him to stop this racket. The prosecutor also, farther along in his argument to the jury, went outside of the record of the testimony when he stated: "These two other people (State's Witnesses) that were there, present on that particular night, they were scared to death when they were called on the witness stand." He thereby implied that the defendant-petitioner had done something to scare them from testifying as the State wanted them to testify.

In such an atmosphere of prejudice, the defendant petitioner clearly failed to get a fair and impartial trial and was therefore deprived of his liberty without due process of law, contrary to the V and XIV Amendments to the Constitution of the United States.

The law on this question was succinctly stated in *State vs. Cloud*, 14 Ohio Opinions (2nd) 132:

> "Arguments of counsel in the trial of a lawsuit are permitted for the sole purpose of aiding the jury in analyzing the evidence and thus assisting them to determine the facts of the case. Arguments made to

incite a jury to convict to meet a public demand are inimical to the basic rights of a defendant, since they prevent him from having a fair and impartial trial to which he is entitled under the law. The law contemplates that he should be convicted on facts proven beyond a reasonable doubt under law applicable to facts so proven."

In *Deutch vs. State*, 46 Ohio Appeals 223, the Court held that when the prosecuting attorney in his argument to the jury discussed terrorism, the underworld, gangland, etc., it was misconduct prejudicial to the rights of the accused.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

July 18, 1962:

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties. Upon a careful reading of the bill of exceptions and a consideration of the assignments of error, the court concludes and holds that no error intervened in the trial of this cause that was prejudicial to the substantial rights of the defendant or that prevented him from having a fair trial. Sec. 2945.83, Revised Code. Therefore the judgment of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant its costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution. Exceptions.

APPENDIX B.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

It is ordered by the Court that this motion is overruled.

APPENDIX C.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

It is ordered by the Court that rehearing in this case is denied.